No. 02-565

NOV 12 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALIM OLEOCHEMICALS,

Petitioner,

v.

M/V SHROPSHIRE, her engines, boilers, tackle, etc., BIBBY INTERNATIONAL SERVICES (IOM) LTD., LANGTON SHIPPING LTD., BOTANY BAY PARCEL TANKERS INTERNATIONAL, BOTANY BAY MANAGEMENT SERVICES PTY LTD., and LANGTON SHIPPING,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ERNESTO V. LUZZATO
Counsel of Record
J. SCOT PROVAN
DANIEL J. MCINERNEY, JR.
HILL RIVKINS & HAYDEN LLP
Attorneys for Respondents
45 Broadway, Suite 1500
New York, NY 10006-3739
(212) 669-0600

177325

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

This case presents the question of whether a party to a bill of lading can avoid the obligations imposed by an arbitration clause incorporated into that bill of lading. Petitioner herein seeks to avoid arbitration by contending arbitration will lessen the obligations, of the carrier or the vessel, imposed by the United States Carriage of Goods By Sea Act, 46 U.S.C. App. §§ 1300-1315. This Honorable Court expressly rejected this argument in *Vimar Seguros y Reseguros v. M/V SKY REEFER*, 515 U.S. 528 (1995).

The petitioner also seeks to avoid arbitration by asserting claims against the agents of the shipowner and charterer, claiming that they were negligent. These agents are bound to and protected by the arbitration clause. The same facts and issues would determine the claims against these agents and their principals. The majority of the federal circuits have recognized that non-signatories can enforce arbitration clauses, as to do otherwise would thwart the federal policy favoring arbitration.

Accordingly, the second question to be addressed herein is whether a party to an arbitration clause can avoid arbitration by asserting tort claims against the agent of another party to the arbitration clause.

CORPORATE DISCLOSURE STATEMENT

None of the Respondents or any parent or subsidiary of the Respondents herein are publicly traded corporations in the United States of America or elsewhere. Respondents, Botany Bay Parcel Tankers International and Botany Bay Management Services Pty Ltd. are both members and subsidiaries of the Botany Bay Group Ltd. Respondent, Bibby International Services (IOM) Ltd. is a member and subsidiary of the Bibby Line Group Ltd. As these companies/ corporations are not publicly held, no publicly held company owns 10% or more of the stock of the company.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Procedural History	1
Statement of the Facts	2
Reasons for Denying the Petition	3
I. Arbitration Will Not Deprive Petitioner Of Any Right Or Remedy	3
A. English Law Allows for the Arrest of a Ship for Damage to Cargo	4
B. Petitioner's *In Rem* Rights Are Extinguished	5
II. All Of Petitioner's Claims Must Proceed To Arbitration	7
Conclusion	10

TABLE OF CITED AUTHORITIES

Federal Cases Cited: *Page*

THE ANACONDA v. American Sugar Refining Co.,
322 U.S. 42 (1944) 7

Arnold v. Arnold Corp.,
920 F.2d 1269 (6th Cir. 1990) 8

Asoma v. Kubbar,
1998 A.M.C. 100 (S.D.TX 1997) 9

Aviall Inc. v. Ryder System, Inc.,
913 F. Supp. 826 (S.D.N.Y. 1996) 8

Choctaw Generation Ltd. v. American Home Assurance Co.,
271 F.3d 403 (2d Cir. 2001) 8

Demsey & Associates, Inc. v . S.S. SEA STAR,
461 F.2d 1009 (2d Cir. 1972) 6

Fireman's Fund Ins. Co. v. the M/V DSR ATLANTIC,
131 F.3d 1336 (9th Cir. 1997) 4

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 8

Fisser v. International Bank,
282 F.2d 231 (2d Cir. 1960) 8

Cited Authorities

	Page
Globe Barge, Inc. v. Johness Hunter, Inc., 1986 A.M.C. 1989 (E.D. LA. 1986)	6
In re Topgallant Lines, 154 B.R. 368 (S.D. Ga. 1993)	5, 6
J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988)	8
Joo Seng Hong Kong v. The S.S. UNIBULKFIR, 483 F. Supp. 43 (S.D.N.Y.1979)	9
The Kalamazoo, (1851) 18 LTOS 66	5, 7
Kukje Hwajae Insurance Co., Ltd. v. the M/V HYUNDAI LIBERTY, et al., 294 F.3d 1171 (9th Cir. 2002)	4
Letizia v. Prudential Bache Securities, 802 F.2d 1185 (9th Cir. 1996)	8
Mackensworth v. S/S AMERICAN MERCHANT, 28 F.3d 246 (2d Cir. 1994)	5
McBro Planning and Dev. Co. v. Triangle Elec. Constr. Corp., 741 F.2d 342 (11th Cir. 1984)	8
Mitsui & Co. (USA), Inc. v. M/V MIRA, et al., 111 F.3d 33 (5th Cir. 1997)	4

Cited Authorities

Page

Mosca v. Doctors Associates, Inc.,
852 F. Supp. 152 (E.D.N.Y. 1993) 7

The New England (J.K. Welding Co. v. Gotham Marine Co.),
47 F.2d 332 (S.D.N.Y. 1931) 6

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
7 F.3d 1110 (3d Cir. 1993) 8

Sam Reisfeld & Son Import Company v. S.A. Eteco,
530 F.2d 679 (5th Cir. 1976) 8, 10

Smith/Enron Cogeneration Limited Partnership v. Smith Cogeneration International,
198 F.3d 88 (2d Cir. 1999) 8

Thyssen Inc. v. Calypso Shipping Corp. ("M/V MARKOS N"),
W.L. 31122383 (2d Cir. 2002) 4

Tradearbed, Inc. v. M/V AGIA SOPHIA,
1997 A.M.C. 2838 (D.N.J. 1997) 9

Vimar Seguros y Reseguros v. The M/V SKY REEFER,
515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995) ..... *passim*

Cited Authorities

Page

Federal Statutes Cited:

Carriage of Goods by Sea Act,
46 U.S.C. App. §§ 1300-1315 ..... i, 3

Federal Arbitration Act,
9 U.S.C. § 8 ..... 6, 7

Fed. R. Civ. P., Admiralty, Maritime Claims,
Supp. Rule E(5) 7

Other Statutes Cited:

English Arbitration Act of 1996,
§ 9 5

English Arbitration Act of 1996,
§ 11 7

English Supreme Court Act of 1981,
§ 20(2)g 4, 6

English Supreme Court Act of 1981,
§ 21(4) 5, 6

Cited Authorities

Page

Other Authorities Cited:

Gilmore & Black, *The Law of Admiralty*, § 9-89 (2d ed. 1975) 6

William Tetley, *Maritime Liens and Claims*, 729 (2d Ed. 1998) 6

STATEMENT OF THE CASE

Procedural History

Respondents adopt the Procedural History, regarding this matter, set forth in the Petition for Writ of Certiorari, with the following additions.

Subsequent to the commencement of this action, respondents moved to compel arbitration to which petitioner agreed. The action was stayed in favor of arbitration. In arbitration, petitioner attempted to claim solely under a contract of affreightment ("COA"), to which it was not a party and refused to proceed under the bill of lading. The shipper was a party to the COA, but petitioner was not. Petitioner was only a party to the bill of lading which incorporated the COA including its arbitration clause. Consequently, there was no agreement to arbitrate presented to the arbitrator. Respondents asked that the arbitration either proceed under the bill of lading or be dismissed. When petitioner refused to proceed under the bill of lading, the arbitrator found that he had no power to proceed in the absence of the bill of lading's arbitration agreement.

The stay in the action was lifted on August 18, 2000, and petitioner moved for summary judgment claiming, *inter alia*, entitlement to the protections of English law. Respondents counter-moved to compel arbitration under the bill of lading. The District Court ordered the parties to arbitrate, as required by the arbitration clause incorporated into the bill of lading. Petitioner has not commenced an arbitration proceeding, pursuant to the bill of lading. The District Court retained jurisdiction and can determine whether an arbitration award derogates from COGSA at award enforcement.

Statement Of The Facts

This appeal concerns the arbitration of a dispute arising from the transportation of cargo of glycerine from Belawan, Indonesia, to Newark, New Jersey. The cargo was shipped under the COA entered into by Salim Oleochemicals Pte. Ltd. ("Salim Pte.") and Botany Bay Parcel Tankers International ("Botany Bay Tankers"), charterer of the M/V SHROPSHIRE. The COA called for London arbitration. Salim Pte., a separate but related entity to petitioner herein, was the shipper of the cargo, which it sold to petitioner, Salim Oleochemicals Inc. ("SOI"). The bill of lading named petitioner as consignee and incorporated the terms of the COA, including the arbitration clause found therein. Petitioner claims the cargo carried under the bill of lading was damaged while on board the M/V SHROPSHIRE. Accordingly, petitioner's claims arise from the transportation of the cargo under a bill of lading, subject to London arbitration.

This action began when petitioner breached its contractual obligations by filing an action in the District Court, in contravention of its obligation to arbitrate. Thereafter, the parties entered into an Order on Consent to arbitrate. Petitioner commenced arbitration in London claiming only under the COA, to which it was not a party. Respondents objected to the arbitration proceeding solely under the COA and requested the petitioner to amend its claim and proceed under the bill of lading, to which petitioner was a party. Petitioner refused. The arbitrator dismissed the arbitration as he lacked jurisdiction without an agreement to which petitioner was a party. Consequently, petitioner aborted the arbitration proceeding by refusing to claim under the bill of lading.

The District Court retained jurisdiction "without prejudice to the right of [petitioner] to reopen it after the conclusion of the London arbitration proceedings if the final decision results in the reduction of the defendants' obligations in violation of COGSA." Petition for Writ of Certiorari, Appendix, p. 14a.

REASONS FOR DENYING THE PETITION

I. ARBITRATION WILL NOT DEPRIVE PETITIONER OF ANY RIGHT OR REMEDY

Petitioner clearly seeks the reversal of the decision in *Vimar Seguros y Reseguros v. The M/V SKY REEFER*, 515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995), which held that foreign arbitration clauses do not derogate from the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. §§ 1300-1315. Petitioner claims that it will lose *in rem* rights if the dispute is decided by a London arbitrator. This Honorable Court in its decision in *Vimar Seguros y Reseguros v. M/V SKY REEFER, supra*, expressly addressed the same issues now raised by petitioner holding that foreign arbitration clauses do not lessen COGSA liability; that the Federal Arbitration Act ("FAA") requires enforcement of an arbitration agreement in a bill of lading; and that COGSA and the FAA do not conflict. Accordingly, this Honorable Court has already decided the issues raised by plaintiff. There is no question that plaintiff seeks to overturn the *SKY REEFER* decision.

Contrary to petitioner's implication, there is no dispute among the federal circuits regarding the enforceability of a foreign arbitration clause in a bill of lading. Only four decisions, by three federal Courts of Appeals, regarding this

issue have been reported since the decision in *M/V SKY REEFER*: two by the Court of Appeals for the Ninth Circuit, one by the Court of Appeals for the Fifth Circuit, and one by the Court of Appeals for the Second Circuit. These cases are: (1) *Kukje Hwajae Insurance Co., Ltd. v. the M/V HYUNDAI LIBERTY, et al.*, 294 F.3d 1171 (9th Cir. 2002); (2) *Fireman's Fund Ins. Co. v. the M/V DSR ATLANTIC*, 131 F.3d 1336 (9th Cir. 1997); (3) *Mitsui & Co. (USA), Inc. v. M/V MIRA, et al.*, 111 F.3d 33 (5th Cir. 1997); and (4) *Thyssen Inc. v. Calypso Shipping Corp. ("M/V MARKOS N")*, W.L. 31122383 (2d Cir. 2002). Of the above-mentioned decisions, only the Second Circuit's decision in the *M/V MARKOS N* addresses an arbitration clause in a bill of lading. Each of these decisions held: that the arbitration clause or forum selection clause did not contravene COGSA; and that the forum selection clauses and arbitration clause were presumptively valid. Review of these decisions will reveal no conflict among the federal circuits.

A. *English Law Allows for the Arrest of a Ship for Damage to Cargo*

Plaintiff's contentions regarding the power of English arbitrators seek to mislead this Honorable Court.

A claim for loss and damage to cargo falls within the admiralty jurisdiction of the High Court of England and Wales. English Supreme Court Act of 1981, Sec. 20(2)(g):

> The admiralty court has *in rem* jurisdiction in respect of such claims where "(a) the claim arises in connection with a ship and (b) the person who would be liable on the claim in an action *in personam* . . . was, when the cause of action

> arose, the owner or charterer of, or in possession or in control of, the ship" and an action *in rem* may be brought against the ship. English Supreme Court Act of 1981, Sec. 21(4).

If a claim for damage to cargo meets the above requirements, the claimant is entitled to have the vessel proceeded against *in rem* and arrested by the Court.

Once a vessel is arrested, security may be posted to obtain the vessel's release. Also, a security agreement can be entered to avoid the arrest of the vessel. If security is provided, the claimant's right to arrest the vessel is extinguished. *The Kalamazoo*, (1851) 18 LTOS 66. After security has been provided and if there is an arbitration agreement, the court proceedings will be stayed and the claim will be referred to arbitration. *English Arbitration Act of 1996*, Sec. 9(1) and (4). Thereafter, the merits of the claim will be decided in arbitration. If a claimant received an award in London arbitration, it looks to the security. In both England and the United States, arbitrators decide the merits of the claim.

B. *Petitioner's In Rem Rights Are Extinguished*

Prior to commencing this action, petitioner requested and was provided with a Letter of Undertaking ("LOU"), in consideration for not arresting the M/V SHROPSHIRE, whereby petitioner's *in rem* claim was secured and transferred to that LOU. The LOU became a substitute *res*, and petitioner was no longer entitled to arrest the vessel. *Mackensworth v. S/S AMERICAN MERCHANT*, 28 F.3d 246, 252 (2d Cir. 1994). An LOU allows the vessel owner to avoid the seizure of the vessel in exchange for the posting of security. *In re Topgallant Lines*, 154 B.R. 368, 377 (S.D.Ga. 1993).

Once a LOU is provided, the lien or *in rem* claim is transferred to the security. *Id.* "The posting of alternative security forever discharges the lien against the vessel." *Globe Barge, Inc. v. Johness Hunter, Inc.*, 1986 A.M.C. 1989, 1993 (E.D.La. 1986); *see also* Gilmore & Black, *The Law of Admiralty*, § 9-89 at pp. 798-800 (2d ed. 1975), *citing*, *The New England (J.K. Welding Co. v. Gotham Marine Co.)*, 47 F.2d 332, 335 (S.D.N.Y. 1931). Petitioner can no longer enforce any claims against the vessel but can only proceed against the security provided. The security remains with the District Court and is available to satisfy an arbitration award. The FAA allows for admiralty claimants, such as petitioner, to obtain security, while preserving the right of all parties to arbitrate. 9 U.S.C. § 8. After arbitration, the District Court can determine whether COGSA has been derogated from in the arbitration. *See SKY REEFER*, 515 U.S. at 538. If the respondents' obligations in arbitration are less than required by COGSA, the District Court can refuse to confirm the award

Petitioner falsely claims that it will receive less under English law. A comparison between United States and English law reveals significant similarities. In both jurisdictions:

(1) A cargo claimant can bring an action to arrest a vessel, *Demsey & Associates, Inc. v . S.S. SEA STAR*, 461 F.2d 1009, 1014 (2d Cir. 1972) ("Every claim for cargo damage creates a maritime lien against the ship which may be enforced by a libel *in rem*."); English Supreme Court Act of 1981 § 20(2)g and § 21(4); William Tetley, *Maritime Liens and Claims*, p. 729 (2d Ed. 1998) (The cargo claimant in the U.K. has a statutory right *in rem* against the carrying vessel);[1]

1. The difference between a maritime lien in the United States and a statutory right *in rem* in the United Kingdom is not significant at this time as security has been posted.

(2) Once a vessel is arrested it can be released by the posting of security. Fed. R. Civ. P., Admiralty, Maritime Claims, Supp. Rule E(5); *The Kalamazoo*, (1851) 18 LTOS 66;

(3) After security is obtained, claims subject to arbitration are referred to arbitration, and the security is retained to satisfy an award given in arbitration. 9 U.S.C. § 8; *THE ANACONDA v. American Sugar Refining Co.*, 322 U.S. 42, 45 (1944); English Arbitration Act of 1996 § 11.

Under the laws of either jurisdiction, arbitrators cannot order the arrest of a ship, only a Court can do so. However, after an arrest or posting of security, arbitrators can decide the merits of the claim.

The real reason for this appeal is that petitioner is time barred from London arbitration, due to petitioner's own conduct aborting the first arbitration. This appeal only exists due to petitioner's dilatory conduct.

II. ALL OF PETITIONER'S CLAIMS MUST PROCEED TO ARBITRATION

The District Court ruled the arbitration agreement herein was broad and could be exercised by nonsignatories. All of the claims alleged against the respondents can be arbitrated. The acts of agents are arbitrable, if the acts, which a plaintiff alleges provides the basis or its cause of action, fall within the scope of the arbitration agreement. *Mosca v. Doctors Associates, Inc.*, 852 F. Supp. 152 (E.D.N.Y. 1993). Accordingly, the claims against the managers must also be arbitrated, contrary to petitioner's contentions.

Nonsignatories to arbitration agreements can become bound thereto without becoming a signatory. *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960). Ordinary principles of contract and agency determine who is bound by arbitration agreements. *Id.*; *see also Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826, 830, *citing First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995). The relevant determination is whether the alleged acts of the managers, on which SOI bases its tort claim, occurred both within and as a result of their agency and within the scope of the arbitration agreement. *Id.*

The federal circuit courts are not in disagreement regarding this issue. The majority of the federal circuits have held that nonsignatories can be bound to arbitration agreements. *Choctaw Generation Ltd. v. American Home Assurance Co.*, 271 F.3d 403 (2d Cir. 2001); *see also Smith/ Enron Cogeneration Limited Partnership v. Smith Cogeneration International*, 198 F.3d 88 (2d Cir. 1999); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990); *Letizia v. Prudential Bache Securities*, 802 F.2d 1185, 1187-88 (9th Cir. 1996); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Corp.*, 741 F.2d 342 (11th Cir. 1984); *Sam Reisfeld & Son Import Company v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

Petitioner alleges its claim arose from the managers "acts or omission in managing the vessel and crew." If the managers owed any duty from which a negligence cause of action could arise, that duty arose from the tasks delegated to these agents by their respective principals, the shipowner and charterer.

The same factual issues would determine petitioner's COGSA claims against the principals, which are subject to arbitration. Both managers in question were disclosed agents of their principals. The question is whether a disclosed agent of a principal can benefit from the terms and conditions of the arbitration agreement including the mandatory arbitration clause?

Petitioner cites cases that establish that it might have a claim against the agents of owners of vessels and managers of vessels. However, it fails to cite any case that deprives an agent of the benefits of an arbitration agreement.

In *Asoma v. Kubbar*, 1998 A.M.C. 100 (S.D.Tx. 1997), there is no reference or discussion of arbitration.

Tradearbed, Inc. v. M/V AGIA SOPHIA, 1997 A.M.C. 2838 (D.N.J. 1997), does not discuss arbitration. Instead, the Court dismissed a claim for unseaworthiness against all defendants, including owners, operators, charterers, and managers of a vessel to enforce a forum selection clause.

Joo Seng Hong Kong v. The S.S. UNIBULKFIR, 483 F. Supp. 43 (S.D.N.Y. 1979), a case decided before *Vimar v. SKY REEFER, supra*, held a plaintiff could not sue under a contract for the sale of goods which has an arbitration clause but could sue for the loss or damage to cargo during ocean transportation, under a bill of lading that had no arbitration clause.

The petitioner's claims against the managers are subject to arbitration. If the *in rem* claims or the claims against the managers were forced to trial, "the arbitration proceedings would be rendered meaningless and the federal policy in favor

of arbitration effectively thwarted." *Sam Reisfeld & Son Import Company v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976). Accordingly, all claims herein must proceed to arbitration. Once again, the real reason for this appeal is that petitioner's claims are time barred from arbitration.

CONCLUSION

The respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari for the foregoing reasons.

Respectfully submitted,

ERNESTO V. LUZZATO
Counsel of Record
J. SCOT PROVAN
DANIEL J. MCINERNEY, JR.
HILL RIVKINS & HAYDEN LLP
Attorneys for Respondents
45 Broadway, Suite 1500
New York, NY 10006-3739
(212) 669-0600